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No. 96-1291

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DOLORES M. OUBRE,
Petitioner,

v.

ENTERGY OPERATIONS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT

MICHAEL G. THOMPSON
O.H. STOREY, III
RENEE W. MASINTER
ROSEMARIE FALCONE
ENTERGY SERVICES, INC.
639 Loyola Avenue
New Orleans, LA 70113
(504) 576-2266

CARTER G. PHILLIPS *
STEPHEN F. SMITH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, DC 20006
(202) 736-8000

Attorneys for Respondent

* Counsel of Record

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QUESTION PRESENTED

Whether the established common law rule that a party may not rescind a contract unless it has first tendered back the consideration it received pursuant to the contract applies to suits brought by an employee under the Age Discrimination in Employment Act ("ADEA"), as amended, 29 U.S.C. § 621 *et seq.*, in contravention of a bargained-for release and waiver of rights that fails to meet the requirements of the Older Workers Benefits Protection Act, 29 U.S.C. § 626(f).

STATEMENT REQUIRED BY RULE 29.6

Respondent Entergy Operations, Inc. ("EOI") is a wholly-owned subsidiary of Entergy Corporation. EOI does not have any subsidiary companies.

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BRIEF FOR RESPONDENT

STATUTE INVOLVED

The Older Workers Benefits Protection Act ("OWBPA"), 29 U.S.C. § 626(f), is reproduced in the Appendix to this brief.

INTRODUCTION

For well over a century, it has been an established rule of law that one who has received benefits under a contract will not be heard to challenge the validity of the contract without first returning the consideration paid pursuant to the contract. The very idea of a party coming into court, seeking to avoid the burdens of a contract while retaining its benefits, has long been viewed as repugnant to fundamental principles of fair dealing and equity. Petitioner and her *amici* in this case urge this Court to displace this established common law rule—which finds expression in the caselaw of each of the 50 States—by inventing a special rule of "federal common law" allowing plaintiffs to sue under the Age Discrimination in Employment Act ("ADEA"), as amended, 29 U.S.C. § 621 *et seq.*, without returning (or even *offering* to return) the money they received from their employers in settlement of potential ADEA claims. The Fifth Circuit properly declined the invitation to override state law, given the text and purposes of the ADEA and the OWBPA, and this Court should do the same.

STATEMENT OF THE CASE

This case comes to the Court on a grant of summary judgment. As such, all disputed issues of material fact must be resolved, at this juncture, in favor of petitioner Dolores M. Oubre. Nevertheless, it should be noted at the outset that there has been no finding that petitioner was constructively discharged on the basis of her age. That vigorously disputed issue of ultimate fact has yet to be determined. Respondent Entergy Operations, Inc. ("EOI") stands ready and willing to litigate petitioner's

claim of age discrimination on the merits. All EOI asks is that petitioner, having repudiated the release agreement between the parties, fulfill her common law duty to make a timely return of the approximately $6,000 EOI paid her on the faith of that agreement before subjecting EOI to the very litigation she pledged not to bring. That is not too much to ask before being haled into court after "buying your peace"; indeed, the law requires no less.

Factual Background

1. EOI operates five plants located throughout Arkansas, Louisiana and Mississippi that generate electricity through the use of nuclear power. In 1994, EOI implemented a new employee ranking procedure called the "Management Planning and Review Ranking Process." Under the Ranking Process, all salaried employees in EOI's Waterford Steam Electric Generating Station ("Waterford 3") located in Killona, Louisiana were ranked in relation to their peers in two separate categories: performance and potential. These rankings were then transferred onto a nine-box matrix, with Group 1 identifying employees who ranked high in both categories and Group 9 identifying employees who scored low in both categories. For all employees who fell into Group 9, EOI offered to develop a personalized "Action Plan" aimed at assisting them in improving their performance and becoming better employees. Employees unwilling to rectify their deficiencies pursuant to an Action Plan were offered the option to resign, in which case they became eligible, upon executing a waiver of rights, to receive a severance payment from EOI.

2. When the Ranking Process was instituted, petitioner, then 40 years old, was a salaried employee in the Planning and Scheduling Department at Waterford 3. Initially hired as a clerk in June 1987 from a temporary employment agency (App. A-10, A-26), she served as a computer operator until she and the other employees in the Department were given the title of "Assistant Scheduler." App. A-35. Her specific job title was "Assistant Outage Scheduler." App. A-10 to A-11. That position

involved computer systems operations and management—tasks which petitioner admitted having "not much knowledge" about except for the "little things" she learned on the job. App. A-32.

The first round of reviews under the Ranking Process were conducted during late 1994. Of the 18 assistant schedulers in the Planning and Scheduling Department, only two received a score of 9. Petitioner was one of the employees who was rated deficient in both performance and potential.

On January 17, 1995, petitioner's direct supervisor and the Department Manager met with her and informed her of her poor ranking. At that meeting, petitioner was advised that, if she wished, "an Action Plan would be written for [her]" (App. A-40), which would have been aimed, among other things, at improving her computer skills. App. A-43. She was also told that if she was not willing to undertake the hard work that would be required to improve her skills, she could accept a voluntary severance package and resign. App. A-38. At the conclusion of the meeting, her supervisor handed her a packet of information pertaining to the severance option (an Action Plan tailored to her particular needs would have to be developed and thus was not available at that time). App. A-44. In order to enable her to consider her options fully and without pressure, EOI gave her two weeks paid leave, with full benefits.

Subsequently, she carefully reviewed the contents of the package, including a letter explaining those contents and the release she understood she would have to sign in order to receive severance benefits. App. A-45. After discussing the matter with a friend of hers and thoroughly reading the letter on several occasions. (App. A-45 to A-46), petitioner contacted EOI's Human Resources Department to confirm certain aspects of the severance package. App. A-46 to A-47. On or about January 24th, she sought and obtained legal advice from not one, but *two* different attorneys as to her rights and

obligations under the release. App. A-19, A-41. She again met with her direct supervisor in person on January 31st and received confirmation of the information she had been given during their initial meeting regarding the Action Plan if she elected to proceed with it.

As she would later "admit[]" under oath, at the conclusion of this extensive and careful deliberative process, she "understood the terms of the severance package" App. A-19. During the January 31, 1997 meeting, she informed her supervisor that she "was ready to sign the release." App. A-51. Accordingly, she took the release out of the packet and duly executed it in their presence. *Id.* The release was countersigned on behalf of EOI, and the paperwork was submitted for processing to arrange payment to petitioner in accordance with the agreement. *Id.*

The release reads, in relevant part, as follows:

> I, Dolores M. Oubre, knowingly, voluntarily, and for valuable consideration agree to waive, settle, release and discharge any and all claims, demands, damages, actions, or causes of action occurring on or before the date of the execution of this Release, whether known or hereafter discovered, that I may have against Entergy Operations, Inc, its parent corporation, subsidiaries, affiliates, officers, directors, employees, agents, and legal representatives and their respective successors, heirs, and assigns ("the Company"), which in any way relate to my employment by or my separation from the Company.
>
> I acknowledge that I was provided with a copy of this Release, that I was advised to discuss this Release with my lawyer, and that I was given no less than 14 days within which to consider signing this Release. I have thoroughly reviewed this Release and understand that, to the extent I have any claims covered by this Release, I am waiving potentially valuable rights by signing below. My execution of this Release is free and voluntary and was not procured through duress, coercion, or undue influence.

> I UNDERSTAND, ACKNOWLEDGE, AND AGREE THAT BY SIGNING THIS RELEASE, I AM OBTAINING ADDITIONAL MONIES AND BENEFITS FROM THE COMPANY IN THE FORM OF A VOLUNTARY SEVERANCE PACKAGE TO WHICH I WOULD NOT OTHERWISE BE ENTITLED. I UNDERSTAND, ACKNOWLEDGE, AND AGREE TO ALL THE TERMS OF THIS AGREEMENT.

App. A-61.

True to its word, EOI paid petitioner the full amount she had been promised under the voluntary severance package. App. A-52. As agreed, every two weeks, from February 1995 until June 6, 1995 (*id.*), EOI delivered to petitioner a ratable share of the total severance benefit. On every occasion, petitioner accepted the funds from EOI, and spent the proceeds on what she termed "living expenses." *Id.*

Petitioner accepted and spent these monies even though, by her own later admission, she had planned all along to sue EOI in violation of the release. As she admitted in her deposition, she decided to sue EOI "[r]ight after" she consulted her two lawyers, which was one week *before* she signed the release and weeks *before* she began receiving the severance payments from EOI. App. A-55. Despite the fact that she never intended to honor the release, petitioner misled EOI into believing otherwise, and accepted each and every payment she received over the ensuing months.

3. As a prerequisite to filing suit (see 29 U.S.C. § 626(b)), petitioner's next step was to file a charge of age discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC"), which has enforcement responsibilities under the ADEA. See 29 U.S.C. § 626. On June 26, 1995, the EEOC issued petitioner a "Dismissal and Notice of Rights" stating, in part, that "[b]ased upon the Commission's investigation, the Commission is unable to conclude that the information obtained estab-

lishes violations of the [age discrimination] statutes." See App. A-7. Petitioner, by this point represented by her current attorney (the *third* she had retained during this episode), filed this lawsuit in the United States District Court for the Eastern District of Louisiana on September 26, 1995, almost eight months after she signed her release, and three months after receiving the final installment on the severance payments. She sought monetary relief under the ADEA and Louisiana law, alleging she had been "constructively discharged" on the basis of her age.[1]

Even though petitioner, by her actions, completely repudiated the release, she never repaid—or even *offered* to repay—the severance benefits she received from EOI. App. A-53. In fact, during her deposition on April 12, 1996, petitioner testified that, if she had to "give back the $6,258" she received in order to proceed with her lawsuit, she probably would not be willing to repay the money using "[w]hat is in [her] savings" or otherwise. App. A-60. Even though, at 42 years of age, she is single and apparently has no dependents to support (App. A-25), and even though she has since found employment elsewhere (App. A-60), she indicated that giving back the money "would be a very hard decision [for her]." *Id.*

Procedural Background

After completion of the discovery process, EOI moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. It argued that, although the release failed to meet all of the numerous formal requirements for a "knowing and voluntary" waiver of ADEA

[1] Although a complaint filed in federal court must allege all facts necessary for the exercise of jurisdiction, *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 231 (1990), and although the ADEA does not confer subject-matter jurisdiction over an employer with fewer than 20 employees, *see* 29 U.S.C. § 630; *Walters* v. *Metropolitan Educ. Enters.*, 117 S. Ct. 660 (1997), petitioner has not alleged that EOI has 20 or more employees. Instead, petitioner merely has alleged that "Defendant, Entery [sic] Operations, Inc., employed greater than eight (8) employees during all times pertinent hereto." App. A-5 (¶ V).

rights under the OWBPA, 29 U.S.C. § 626(f), petitioner could not maintain suit in contravention of the release without first returning (or "tendering back") to EOI the money it had paid her on the faith of the release. In support of that contention, EOI relied, *inter alia*, upon *Wamsley* v. *Champlin Ref. & Chems.*, 11 F.3d 534 (5th Cir. 1993), which held that "justice and equity require the employee who seeks to avoid the obligations to which he agreed under the settlement agreement to return the consideration which he received for his promise not to sue" as a condition precedent to bringing suit. *Id.* at 542.

The district court granted the motion. Notwithstanding the failure of the release to "meet some of the[] criteria" set forth in the OWBPA (App. A-20), the court ruled that "[t]he undisputed facts here fit squarely into the rule set forth in *Wamsley*." *Id.* The Fifth Circuit agreed, and issued a unanimous unpublished opinion affirming "for the reasons enunciated by the district court." App. A-22 to A-23. This Court granted certiorari, limited to the third question presented by petitioner.

SUMMARY OF ARGUMENT

This Court should decline petitioner's invitation to overrule the long-standing common law rule that a party may not challenge a contract or transaction without first returning the fruits of the contract or transaction. The tender-back rule has existed for more than a century, and is based on the unfairness of permitting a party to retain the benefits of a transaction while repudiating its obligations or duties. The rule finds expression in a number of common law principles, including the doctrines of ratification, equitable estoppel and rescission.

Each of these doctrines bars petitioner from maintaining suit in this proceeding without making the required tender of the consideration respondent paid her in exchange for her release. Petitioner, in what can only be termed a fraudulent scheme, falsely informed respondent that she was willing to release any claims she might have

in order to receive severance benefits to which she otherwise would not have been entitled. She ultimately signed the release even though, as she admitted below, she had already decided to sue respondent, and thus never had any intention of honoring the release. By virtue of her deception, she received more than $6,000 in severance benefits and never, over the entire four-month period that the benefits were paid to her, informed respondent of her intentions. Because she never tendered back or offered to tender back the severance benefits prior to filing suit, petitioner's suit is barred under the settled common law doctrines discussed above.

In a desperate attempt to avoid the consequences of her actions, petitioner urges the Court to take the rare step of fashioning a special rule of federal common law that would permit her to go forward despite the patent inequity of her conduct in this case. Such judicial lawmaking would plainly be improper. It is well settled that the common law will not be superseded by statute unless the express language of the statute clearly manifests congressional intent to override the common law. The text of the OWBPA demonstrates no such intent, nor does the legislative history. Simply stated, the OWBPA and the tender-back rule do not conflict; indeed, they are wholly consistent. The tender-back rule, as reflected in the doctrines of ratification, estoppel and rescission, recognizes, as it must under the OWBPA, that a release that does not meet the statutory requirements for a "knowing and voluntary" waiver is voidable at the election of the employee, and may not be enforced against the employee. In this sense, the tender-back rule petitioner assails, in contrast to the peculiar rule petitioner advocates, gives an employee complete protection against an invalid waiver but also the freedom to retain and enforce against an employer what he perceives to be a favorable settlement. The tender-back rule, as applied in the ADEA context, merely requires a would-be plaintiff who has discovered grounds for avoiding a release of rights to return the consideration received for the release within a reasonable period of time but no later than the time of suit.

Contrary to the assertion of petitioner and her *amici*, this Court's two-page, *per curiam* decision in *Hogue* v. *Southern Railway*, 390 U.S. 516 (1968), does not compel rejection of the tender-back rule. That decision addressed the rule in the context of a very different statute, the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, which was enacted for the purpose of providing a liberal and expeditious means of recovery for injured railroad workers. Unlike FELA, the ADEA was not enacted to strip an employer of its common law defenses or to subject the employer to almost certain liability. To the contrary, relief is available under the ADEA only where the employee can make the difficult showing that he was discriminated against on account of his age, and where the employee can withstand the employers' assertion of a number of statutory defenses, including the bona fide occupational qualification defense. *Hogue*, simply put, is *sui generis*, and provides no basis for overriding the tender-back rule under the ADEA.

Finally, failure to apply the tender-back rule under the ADEA would frustrate the congressional goal of promoting settlement and voluntary conciliation of age discrimination claims. Given the difficulty of determining whether a release is "knowing or voluntary," as defined in the OWBPA, employers will have no incentive to voluntarily provide displaced workers with any sort of severance benefits if employees can retain the benefits for use as a "war chest" in later litigation. Significantly, adoption of the tender-back rule would not, as petitioner charges, insulate age discrimination from court challenge, in view of the EEOC's clear statutory authority to initiate and bring enforcement proceedings notwithstanding any waiver by an employee who, unlike petitioner, has been the victim of age discrimination.

In the alternative, if this Court were to reject the tender-back rule as a general matter, it should retain the rule where as here, the employee has fraudulently induced an employer to enter a release agreement. There is no federal policy to encourage fraud, yet that is pre-

cisely what petitioner has committed in this case. Petitioner deceived respondent into believing that she intended to honor her release of claims, knowing full well that she would bring suit in violation of the release as soon as she received for her final payment. At a minimum, the tender-back rule should be retained for such cases of fraudulent inducement.

For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed.

ARGUMENT

I. PETITIONER'S CHALLENGE TO THE VALIDITY OF HER RELEASE IS BARRED BECAUSE SHE HAS REFUSED TO PERFORM HER DUTY TO TENDER BACK TO RESPONDENT THE BENEFITS IT PAID HER PURSUANT TO THE RELEASE.

Petitioner and her *amici* discuss the "tender back" rule solely in terms of the common law doctrine of ratification, which is "the enforcement of a promise to perform all or part of an antecedent contract of the promisor, previously voidable by him, but not avoided prior to the making of the promise." *Wamsley*, 11 F.3d at 538. Indeed, petitioner quite explicitly equates the two, asserting that the tender-back rule "is so closely aligned" with ratification that it cannot stand independent of ratification. Pet. Br. 32. By equating the tender-back rule with ratification, petitioner and her *amici* unduly minimize the breadth and force of the tender-back rule at common law.

As the law books make clear, the tender-back rule is not synonymous with ratification. To the contrary, the rule merely finds expression in that doctrine, and in other deeply rooted doctrines of the common law, *i.e.*, equitable estoppel and rescission. Each of these doctrines forecloses petitioner's unfair—indeed, *fraudulent*—attempt to retain the benefits of the release while, at the same time, attacking the release in order to avoid her obligations thereunder. *No* court—whether at law or equity, or whether under the rubric of ratification, estoppel or rescission—would approve of such sharp dealing, which is plainly

contrary to the basic standards of honesty and fair dealing demanded by the law.

A. By Retaining The Consideration Respondent Paid Her After She Secretly Resolved To File Suit In Violation Of Her Release Agreement, Petitioner "Ratified" The Transaction She Now Challenges.

Under the ratification doctrine, it is "well settled" that a party who learns of grounds to avoid (or "disaffirm") a "voidable" transaction "must act promptly, '[a]nnounce his purpose and adhere to it.'"[2] *Shappirio* v. *Goldberg*, 192 U.S. 232, 242 (1904). A prompt election is required because to remain silent despite knowledge of grounds for disaffirmance "is wholly inconsistent with an election to undo the transaction and stand upon his right to rescind the contract." *Id.* at 243. If a party wishes to disaffirm, "he must return to the other party what he has received, so as to put him in the same position he was in before," and must do so within a reasonable time. *Gay* v. *Alter*, 102 U.S. (12 Otto) 79, 80 (1880). The "reasonable time" for making the tender does not begin to run until the party has the information necessary to determine that the contract is voidable. See *Hoyt* v. *Latham*, 143 U.S. 553, 568 (1892) (holding that "[i]n cases of actual fraud, or of want of knowledge of the facts, the law is very tolerant of delay"). Unless the benefits received are tendered back within a reasonable time, "a ratification would be presumed" to have occurred.

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[2] A contract is "voidable" if "one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance." Restatement (Second) of the Law of Contracts § 7 (1981) ("Restatement"). The classic examples of voidable contracts are contracts procured by fraud, duress or coercion, or mistake of fact. *Id.* § 7, cmt. b. By contrast, a contract is "void" if "the law neither gives a remedy [for its breach] nor otherwise recognizes a duty of performance." *Id.* § 7, cmt. a. Although "[i]llustrations of agreements that are wholly void of legal effect are not very numerous," a contract premised on an "illegal bargain," such as a contract to commit murder, is a rare example of a void contract. 1 Joseph M. Perillo, *Corbin on Contracts* § 1.7, at 21-22 (Rev. ed. 1993).

Indianapolis Rolling-Mill Co. v. St. Louis, Fort Scott & Witchita R.R., 120 U.S. 256, 259 (1887).

Although the theory differs somewhat, the ratification rule is similar in operation to the familiar rule of rescission at law. Under the common law rule, the party with the power to avoid a contract cannot sue unless he makes a pretrial tender of the consideration he received. See 1 Dan B. Dobbs, *Laws of Remedies* § 4.8, at 673 (2d ed. 1993). Such a tender was necessary because "[u]nder the 'at law' procedure for restitution, the court does not effect the rescission upon which restitution is based; the plaintiff effects the rescission, and the court gives a judgment for restitution if that is needed." *Id.* at 674; see also, *e.g.*, *Savers Fed. Sav. & Loan Ass'n* v. *First Fed. Sav. & Loan Ass'n*, 768 S.W.2d 536, 538 (Ark. 1989). Stated differently, under the common law rule, the tender is no empty formality—it is, to the contrary, the very act that produces the rescission, freeing the plaintiff to bring an action for damages.

The equity courts of both past and present took a slightly different approach to the problem of rescinding a voidable contract other than a settlement agreement. It was the chancellor, not the would-be petitioner, who decreed rescission. See 1 Dobbs, *Law of Remedies* § 4.8, at 675. Given that rescission would not occur in equity until entry of a court decree at the conclusion of the proceeding, there was no simultaneous retention of benefits and repudiation of burdens and, accordingly, no need for a pretrial tender by the plaintiff. *Id.* Even so, equity courts would not decree rescission absent some guarantee (usually in the form of a decree conditioned on tender) that he who had sought equity would do equity, which would include tendering back the consideration he had received. *Id.* The celebrated flexibility of equity, however, was replaced by rigidity, even in run-of-the-mill contracts, where it was plain that he who sought equity had no intention of doing equity.[3]

[3] Although it arose out of an unfortunate set of facts, the decision of Justice Daniel, sitting by designation in *Garland* v. *Bowling*, 10

Importantly, given the nature of a release agreement, a pretrial tender is required even under the more flexible rule of equity. In a release agreement or settlement, one side gives up the right to assert and prosecute a claim for relief, in exchange for payment or some other consideration from the opposing party. When petitioner filed suit notwithstanding her prior release, she, by force of her own actions, rescinded the release and reclaimed the "property" she had previously surrendered in consideration of the severance payments (*i.e.*, her causes in action).

According to a leading treatise:

> The special feature of such cases [where suit is filed in violation of a release or settlement agreement] is that the plaintiff gets restitution merely by suing. What he gave up in the transaction was the right to sue. If he is allowed to proceed, he has taken back what he gave, whether or not he wins the ultimate claim. For this reason, *the logic of restitution would seem to require an immediate, pre-trial restoration by the plaintiff of whatever settlement sums he received under the release.*

2 Dan B. Dobbs, *Law of Remedies* § 9.3(3), at 590 (2d ed. 1993) (emphasis added); *cf. Garland* v. *Bowling*, 10 F. Cas. 5 (C.C.D. Ark. 1855) (pretrial tender back required where option of granting relief in equity conditioned on restoration is not available). Consequently, the option of entering an award of restitution in petitioner's favor conditioned on a requirement that she first

F. Cas. 5 (C.C.D. Ark. 1855), is illustrative. In that case, a slavemaster sought to enjoin enforcement of a damages award rendered against him for the purchase price of five slaves. The court ruled that the slavemaster's failure to tender the slaves back was "a complete bar to relief." *Id.* at 5. Justice Daniel explained: "His object appears to be to enjoin the collection of the purchase-money and retain the negroes. Such conduct a court of equity cannot sanction. If he desires to rescind the contract for any cause whatever, and is entitled to do so, he is bound to restore to the adverse party what he received from him. This is demanded by the rules of equity and fair dealing, and is without exception in the forum of conscience. He cannot hold the property of another, and refuse to pay for it." *Id.*

tender back the consideration she received would not have been available to an equity court.

Even after the merger of law and equity, courts have insisted on pretrial tender of consideration where suit is brought in contravention of a settlement agreement. At least two courts have explicitly rejected appeals to merger of law and equity as a basis for abrogating the tender-back rule. See, *e.g.*, *Stefanac* v. *Cranbrook Educ. Community*, 458 N.W.2d 56, 66 (Mich. 1990) ("We hold as a matter of law that a plaintiff must, in all cases where a legal claim is raised in contravention of an agreement [of settlement], tender the consideration recited in the agreement prior to or simultaneously with the filing of suit."); *Doe* v. *Golnick*, 556 N.W.2d 20, 23 (Neb. 1996) ("When a person seeks to avoid the effect of a release because it is either void or voidable, he or she must first restore or offer to restore whatever he or she has received for executing the release."). Scores of other decisions have applied the tender-back rule to suits brought in contravention of a release or settlement notwithstanding the merger of law and equity. See, *e.g.*, *Midwest Petroleum Co.* v. *Department of Energy*, 760 F.2d 287, 291-92 (Temp. Emer. Ct. App. 1985); *Asberry* v. *United States Postal Serv.*, 692 F.2d 1378, 1381 (Fed. Cir. 1982).[4] On this issue, therefore, law and equity point to the same conclusion—a plaintiff cannot be permitted to maintain suit after settlement without first tendering back the consideration received pursuant to the settlement agreement.

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[4] *See also, e.g., Morta* v. *Korea Ins. Corp.*, 840 F.2d 1452, 1455 n.4 (9th Cir. 1988); *Anselmo* v. *Manufacturers Life Ins. Co.*, 771 F.2d 417, 420 (8th Cir. 1985); *Spradling* v. *Blackburn*, 919 F. Supp. 969, 977 n.19 (S.D. W. Va. 1996); *Edmondson* v. *Dressman*, 469 So.2d 571, 573 (Ala. 1985); *Larsen* v. *Johannes*, 86 Cal. Rptr. 744, 751 (App. 1970); *Prall* v. *Indiana Nat'l Bank*, 627 N.E.2d 1374, 1379 (Ind. App. 1994); *Meisel* v. *Mueller*, 261 S.W.2d 526, 534 (Mo. App. 1953); *Todd* v. *Berner*, 693 P.2d 506, 509-10 (Mont. 1984); *Davis* v. *Hargett*, 92 S.E.2d 782, 785 (N.C. 1956); *Maust* v. *Bank One Columbus*, 614 N.E.2d 765, 770 (Ohio App. 1992); *Guion* v. *Guion*, 475 S.W.2d 865, 869-70 (Tex. Civ. App. 1971).

As the courts below correctly ruled, petitioner is barred under the ratification doctrine from proceeding on her claims against EOI. Contrary to the requirements of the common law, petitioner did not tender back the severance pay she received by virtue of the release within a reasonable period of time following her discovery of grounds to avoid her release. In fact, she has *never* made a tender of benefits. In a suit seeking legal relief—and petitioner's claim for liquidated and compensatory damages under the ADEA plainly constitutes such relief, see *Lorillard* v. *Pons*, 434 U.S. 575 (1978)—petitioner's failure to make a pretrial restoration of the consideration itself is fatal to her claim in terms of the common law. See, *e.g.*, *Gay* v. *Alter*, 102 U.S. (12 Otto) at 80. Indeed, no one—neither petitioner nor her *amici*—suggests the contrary.

B. Because Petitioner, By Word And Deed, Induced Respondent To Pay Her Valuable Consideration Which She Otherwise Would Not Have Received, And Brought This Action Without Tendering The Consideration Back To Respondent, Petitioner Is Estopped From Challenging Her Release.

Petitioner's suit also founders on the common law doctrine of equitable estoppel. As this Court has noted, the doctrine is "older than the country itself." *Glus* v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231, 234 (1959); see generally 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 802, at 1635 (4th ed. 1918) ("*Equity Jurisprudence*") ("Estoppel was recognized by the common law at a very early day."). As Lord Coke explained long ago, there are three basic categories of estoppel: (1) estoppel by record; (2) estoppel by deed; and (3) estoppel in pais, commonly referred to as equitable estoppel. *Id.*

The first two types of estoppel, collectively referred to as "legal estoppels," are distinguished from equitable estoppel. Legal estoppels "exclude the evidence of"—or "stoppeth" one's mouth to assert—"the truth, and the equity of the particular case, to support a strict rule

of law on grounds of public policy," such as not impeaching public records or deeds. *Id.* at 1636-37. As its name suggests, equitable estoppel seeks a fundamentally different objective—namely, "to avoid injustice in particular cases," *Heckler* v. *Community Health Servs.*, 467 U.S. 51, 59 (1984).

As Pomeroy explains:

> Equitable estoppel in the modern sense arises from the *conduct* of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience. *Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights* which might have existed or been enforceable by other rules of the law, unless prevented by the estoppel[.]

Equity Jurisprudence § 802, at 1635-36 (second emphasis added; footnote omitted); see also, *e.g.*, *Insurance Co.* v. *Wilkinson*, 80 U.S. (13 Wall.) 222, 233 (1871). In other words, this branch of estoppel "proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent."[5] *Morgan* v. *Railroad Co.*, 96 U.S. (6 Otto) 716, 720 (1877).

In this sense, equitable estoppel is wielded not as a sword, but rather as shield against the inequitable assertion

[5] Although common law courts sometimes said that equitable estoppel applied only where "fraud" had occurred, "courts of equity . . . have always treated the word 'fraud' in a very elastic manner." *Equity Jurisprudence* § 803, at 1640. In keeping with that elastic interpretation, courts of equity "apply the term 'fraudulent' to the party estopped" when faced with "his repudiation of his own prior conduct which had amounted to an estoppel, and his assertion of claims notwithstanding his former acts or words, would be *fraudulent*,—would be a *fraud* upon the rights of the person benefited by the estoppel." *Id.* If it were otherwise—that is, if misrepresentations made with intent to defraud were required—then the doctrine of equitable estoppel would be "a mere instance of legal fraud." *Id.*

of a "technical advantage . . . set up and relied upon to defeat the ends of justice or establish a dishonest claim." *Wilkinson*, 80 U.S. (13 Wall.) at 223. Although legal estoppel was once disfavored as unduly harsh, equitable estoppel—which has bridged the divide between law and equity, see *id.*—has long been favored because it promotes fairness, honesty and justice. See, *e.g.*, *Morgan*, 96 U.S. (6 Otto) at 720 ("The principle [of equitable estoppel] is an important one in the administration of the law. It not unfrequently gives triumph to right and justice where nothing else could save them from defeat.").

The doctrine has been repeatedly employed to estop a party from denying or avoiding the burdens of a transaction while retaining the benefits of that transaction. The operative principle was fully explained by this Court in *Insurance Co.* v. *Wilkinson* as follows: "[W]here one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience to assert, he would not in a court of justice be permitted to avail himself of that advantage." 80 U.S. (13 Wall.) at 233; see also, *e.g.*, *McLean* v. *Clapp*, 141 U.S. 429, 432 (1891) ("[T]he law is clear that [one] cannot take the benefits of [a] contract and repudiate its burdens."). In these circumstances, the knowing and inequitable retention of benefits while attacking the validity of a transaction estops the challenger.[6]

[6] *See also, e.g.*, *Thompson* v. *Consolidated Gas Utils. Corp.*, 300 U.S. 55 (1937); *Magee* v. *United States*, 282 U.S. 432 (1931); *Frost* v. *Corporation Comm'n*, 278 U.S. 515 (1929); *Exchange Trust Co.* v. *Drainage Dist.*, 278 U.S. 421 (1929); *Buck* v. *Kuykendall*, 267 U.S. 307 (1925). Of course, estoppel would not preclude a challenge to a transaction that itself was a violation of law. *See Reiter* v. *Cooper*, 507 U.S. 258, 266 (1993) (common carrier paid to ship goods not estopped from suing shipper to recover undercharges unlawful under filed-rate doctrine); *Bement & Sons* v. *National Harrow Co.*, 186 U.S. 70 (1902) (beneficiary of contract can resist enforcement on grounds that contract violates antitrust laws). The transaction here at issue—a settlement of a potential age discrimination claim—obviously is not illegal, even if the release fails to com-

The rule of estoppel has been applied in a wide range of contexts to prevent the inequitable assertion of legal rights. Thus, for example, courts have routinely estopped parties in possession of benefits from questioning the validity of contracts, see, *e.g.*, *United States ex rel. Int'l Contracting Co.* v. *Lamont*, 155 U.S. 303 (1894); settlement agreements, see, *e.g.*, *McLean* v. *Clapp*, 141 U.S. 429 (1891); conveyances, see, *e.g.*, *Buffum* v. *Peter Barceloux Co.*, 289 U.S. 227 (1933); *Keller* v. *Ashford*, 133 U.S. 610 (1890); and judgments or administrative orders, see, *e.g.*, *Federal Power Comm'n* v. *Colorado Interstate Gas Co.*, 348 U.S. 492 (1955); *Winslow* v. *Baltimore & Ohio R.R.*, 208 U.S. 59 (1908).[7]

Where estoppel is premised upon the knowing retention of benefits, it is within the power of the party wishing to challenge the transaction under which he received those benefits to free himself from the effect of the estoppel. Because the source of the inequity in this context is denying one's duties while retaining the benefits received in consideration of those duties, the estoppel can be eliminated entirely by tendering back to the other party the benefits received. As this Court held in *Buffum* v. *Peter Barceloux Co.*, upon surrendering the benefits of the transaction, "[t]he basis for an estoppel is cut away." 289 U.S. at 234; see also, *e.g.*, *Barnett Nat'l Bank* v.

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ply with the procedural requirements of the OWBPA, 29 U.S.C. § 626(f)(1).

[7] The state decisions are in accord. For cases applying this estoppel rule to bar a challenge to a contract, *see, e.g., Young* v. *Burchill*, 274 P. 379 (Cal. 1929); *W.B. Leedy & Co.* v. *Shirley*, 104 S.E.2d 580 (Ga. App. 1958); *Payette Lakes Protective Ass'n* v. *Lake Reservoir Co.*, 189 P.2d 1009 (Idaho 1948); *P.V. & K. Coal Co.* v. *Kelly*, 191 S.W.2d 231 (Ky. 1945); *Wasserman* v. *Autohaus on Edens, Inc.*, 559 N.E.2d 911 (Ill. App. 1990); *Savage* v. *Wyatt Lumber Co.*, 64 So. 491 (La. 1914); *Schnack* v. *Applied Arts Corp.*, 278 N.W. 117 (Mich. 1938); *Otero* v. *Wheeler*, 701 P.2d 369 (N.M. 1985); *Andreasen* v. *Hansen*, 335 P.2d 404 (Utah 1959); *Phillips Petroleum Co.* v. *Taggart*, 73 N.W.2d 482 (Wis. 1955); *see also, e.g., Certified Roofing Co.* v. *Jeffrion*, 22 So.2d 143 (La. App. 1945) (same as to settlement agreement).

Murrey, 49 So.2d 535, 536 (Fla. 1950); *Bender* v. *Bateman*, 168 N.E. 574, 575 (Ohio App. 1929).

As applied to this case, it is clear that the doctrine of equitable estoppel precludes petitioner from proceeding with this lawsuit. She remains in possession of the consideration she received for the release, and it is undisputed that respondent would not have paid her those funds but for her waiver. At the same time, however, petitioner challenges the validity of her waiver of rights under the OWBPA. Worse still, petitioner obtained those benefits through active fraud. She informed respondent that she was willing to sign a release, actually signed a waiver, and accepted thousands of dollars in severance payments, knowing all the while that her real intent was to sue respondent notwithstanding the release. It is precisely to guard against such inequitable conduct that the common law made liberal use of equitable estoppel. It is both unquestioned and unquestionable that, absent federal law to the contrary, petitioner is estopped to challenge her waiver until she tenders back to respondent the full amount of the severance payments she has received.

II. THIS COURT SHOULD REJECT PETITIONER'S INVITATION TO OVERRIDE THE COMMON LAW TENDER-BACK RULE IN THE NAME OF FEDERAL COMMON LAW BECAUSE THE RULE DOES NOT CONFLICT WITH THE OWBPA OR THE ADEA.

Petitioner, seeking to avoid the force of principles of equity and fair dealing that have commanded universal support in the common law for more than 100 years, asks this Court to legislate a radically different answer to the policy question answered long ago by the tender-back rule. Specifically, petitioner urges the Court to fashion "what one might call 'federal common law' in the strictest sense, *i.e.*, a rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but, rather, to the judicial 'creation' of a special federal rule of decision." *Atherton* v.

FDIC, 117 S. Ct. 666, 670 (1997). In this petitioner entreats the Court to make free-wheeling use of a law-making power reserved for Congress, save only in discrete classes of exceptional cases involving either uniquely federal interests or a delegation of authority to fashion an entire body of law.[8] See *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981).

"Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 312 (1981). This reticence to resort to common-law decisionmaking divorced from state law has both separation of powers and federalism dimensions. "The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives." *Id.* at 312-13; see also, *e.g.*, *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 (1981) (stating that "the federal lawmaking power is vested in the legislative, not the judicial, branch of government"). In short, as this Court has repeatedly declared, " '[t]here is no federal general common law.' " *O'Melveney & Myers* v. *FDIC*, 512 U.S. 79, 83 (1994) (quoting *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938)).

With these principles in mind, it becomes clear just how heavy petitioner's burden is to justify her proposed radical departure from the common law. To prevail on

[8] Petitioner erroneously suggests (Pet. Br. 29) that it is respondent who seeks a federal common law rule in this case. Respondent's position is that this Court should *refrain* from such lawmaking under the OWBPA through use of settled and universally accepted common law doctrines, such as estoppel, ratification and rescission. Because the relevant question here is whether those doctrines may be applied under the OWBPA, it is only of "theoretical interest" whether state law controls of its own force, or simply provides the content of the federal rule of decision in this area. *O'Melveney & Myers* v. *FDIC*, 512 U.S. 79, 85 (1994).

her claims in this Court, she must show either (1) that application of state common law rules "would . . . contradict an explicit statutory provision," *id.* at 85; or (2) that "there is a 'significant conflict between some federal policy or interest and the use of state law.' " *Id.* at 87 (internal citation omitted). Petitioner's arguments fall far short of the mark on both counts, as explained below.

A. The OWBPA Does Not Displace The Tender-Back Rule Because The Statute Does Not "Speak Directly" To The Issue And Because The Rule Is Fully Consistent With The Text And Legislative History Of The OWBPA.

Petitioner argues (Pet. Br. 23-31) that the tender-back rule is barred by the text and legislative history of the OWBPA. Her basic argument is two-fold: first, a waiver of rights that does not meet each of the formal requirements of the OWBPA for a "knowing and voluntary" waiver "is invalid and has no effect," and thus is not subject to ratification (Pet. Br. 25); and, second, the purpose of the OWBPA was "to displace common law doctrine provisions with respect to waivers for age discrimination claims." Pet. Br. 27. These arguments are addressed, in turn, below.

1. *OWBPA Text.* The starting point for the analysis is the text of the OWBPA. That statute, which was added in 1990 as an amendment to the ADEA (see Pub. L. No. 101-433, 104 Stat. 978 (1990)), provides that "[a]n individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1). It further provides that "a waiver may not be considered knowing and voluntary unless at a minimum" it meets numerous formal requirements set forth in § 626(f)(1)(A)-(H). The statute places on the employer the burden of proving that a waiver is "knowing and voluntary" as defined in the OWBPA. *Id.* § 626(f)(3).

The Solicitor General, as *amicus curiae*, argues that the statutory enumeration of particular requirements that

must be met in order for a release to be valid, and the placement on the employer of the burden of proving satisfaction of those requirements, "reflect a displacement" of common law principles in general. U.S. Br. 14. Although these aspects of the OWBPA specify requirements not found in the common law rules, it requires a breathtaking leap of logic to argue from those specific requirements that Congress rejected *all* relevant common law principles. The more logical conclusion, given the maxim "Inclusio unius, exclusio alterius," is that where Congress wished to depart from common law principles, it included specific language to that effect in the OWBPA. See *O'Melveny & Myers*, 512 U.S. at 86. More fundamentally, a legislative "desire to enhance the common law in specific, well-defined situations does not signal its desire to extinguish the common law in other situations." *United States* v. *Texas*, 507 U.S. 529, 535 n.4 (1993). Thus, any conclusion that common law principles are not to be applied here must be drawn from other aspects of the OWBPA.

In considering whether the language of the OWBPA supersedes the common law's tender-back rule, an important interpretive principle must be applied. "It is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.'" *Norfolk Redev. & Hous. Auth.* v. *Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983) (quoting *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1813)). Despite petitioner's assertion that this rule does not "entail[] a requirement of clear statement" (Pet. Br. 30 n.17), the law is plainly otherwise—which is why it is "'the *language* of the statute'" that must "'be *clear and explicit*'" before the common law is deemed supplanted. *Norfolk Redev. & Hous. Auth.*, 464 U.S. at 35 (emphasis added).[9]

[9] In *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104 (1991), this Court declined to apply the "clear statement" requirement to the question of administrative issue preclusion in the ADEA context. It did so, however, because administrative (in contrast to judicial) preclusion does not "represent independent values of such magnitude and constancy to justify the protection of a clear-statement rule." *Id.* at 109. The tender-back rule, which arises out of numerous common law doctrines, is a fundamental principle of justice in the administration of the law that dates back to the days of Lord Coke. As such, it certainly is entitled to the protection of the clear statement rule. Moreover, consistent with the clear statement rule, the *Astoria* Court ultimately grounded its refusal to give collateral estoppel effect to state agencies' administrative findings on the text and structure of the ADEA, not on legislative history or the disembodied "purposes" of the statute. *See id.* at 111-13.

This Court unanimously reaffirmed this rule in *United States* v. *Texas*: "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." 507 U.S. at 534 (quoting *Mobil Oil Corp.* v. *Higginbotham*, 426 U.S. 618, 625 (1978)); see also *id.* at 540-41 (Stevens, J., dissenting) (agreeing that "we are reluctant to infer a legislative abrogation of the common law" and "expect Congress to *state clearly* any intent to reshape that terrain") (emphasis added); but see *Long* v. *Sears Roebuck & Co.*, 105 F.3d 1529, 1539 n.17 (3d Cir. 1997) ("[W]e believe that it would be wrong to conclude, as does the dissent, that simply because ratification is *not rejected in the text or legislative history* of the OWBPA that the common law is unchanged.") (emphasis added).[10]

[10] The sole authority petitioner cites (Pet. Br. 30 n.17) in opposition to a clear-statement rule for superseding the common law, *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), dealt with the determination of whether state law is preempted under the Supremacy Clause, and thus has no bearing here. Petitioner (Pet. Br. 13) and the Solicitor General (U.S. Br. 19) proffer a snippet from the legislative history stating that "the [Senate Labor and Human Resources] Committee intends that the requirements of [the OWBPA] be strictly interpreted to protect those individuals covered by the Act." S. Rep. No. 101-263, at 31, *reprinted in* 1990 U.S.C.C.A.N. 1509, 1537 (*"Senate Report"*). Such a fleeting statement "that is in no way anchored in the text of the statute" is entitled to no weight because "courts have no authority to enforce a principle

Read with these principles in mind, it is plain that the OWBPA does not repeal the common law tender-back rule, as incorporated in the concepts of ratification, rescission and equitable estoppel. These bases for the tender-back rule are considered *seriatim* below.

a. As for ratification, petitioner correctly concedes that it is a "common-law principle [that] is well established" (Pet. Br. 30). She and her *amici* go astray, however, in arguing that three words from § 626(f)(1)—the "may not waive" language—absolutely preclude application of the ratification doctrine. According to petitioner, "a plain reading of the statute prohibits a waiver of ADEA rights by an employee unless the requirements of the statute are met". Pet. Br. 23. Respondent agrees with that statement—the statute does plainly preclude enforcement of a "waiver" of rights that is not knowing and voluntary under § 626(f). Where petitioner and her *amici* err is in their assertion that adherence to the ratification doctrine produces a "waiver" of rights.

The cursory textual analysis offered in opposition to the tender-back rule founders on the meaning of "waiver" —which petitioner and her *amici* never pause to consider. Because "waiver" is a "judicially defined concept," "it is presumed . . . that Congress intended to adopt the interpretation placed on that concept by the courts." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989). The concept of waiver is well defined in this Court's precedents: "[W]aiver is the 'intentional relinquishment or abandonment of a known right.'" *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). Resort to the principle that remedial legislation should be broadly construed—which this Court has termed "th[e] last redoubt of losing causes," *Director, Office of Workers' Comp. Programs* v. *Newport News Shipbuilding & Dry*

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gleaned solely from legislative history that has no statutory reference point." *Shannon* v. *United States*, 512 U.S. 573, 583-84 (1994) (editorial revisions and internal quotation marks omitted).

Dock Co., 514 U.S. 122, 135 (1995)—cannot justify expanding "waiver" beyond its accepted meaning in the law. As Justice Harlan stated for the Court in *United States* v. *Zacks*, 375 U.S. 59 (1963), the "remedial" nature of a statute cannot "be stretched to expand the reach of a statute." *Id.* at 68; see also, *e.g.*, *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979) (holding that "generalized references to the 'remedial purposes' of [a statute] will not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit'").

In this case, there has been only one waiver of rights by petitioner—the release she signed in order to acquire the severance benefits respondent offered to all employees who elected to resign instead of entering a program to improve their deficient performance. Although petitioner "admitted" under oath that "she understood the terms of the severance package" (App. A-19), and although she admittedly entered into the release only as part of a dishonest scheme to obtain severance benefits without any good-faith intention to honor the release (App. A-55), respondent does not contend that she is bound by the release she signed. To the contrary, respondent recognizes (as did the courts below) that the release cannot be enforced against her because it failed to comply with a number of the technical requirements of the OWBPA.

The fact that a right to sue under the ADEA cannot be defeated by a waiver not in compliance with the OWBPA does not suggest that the right cannot be lost—or forfeited—through other means. As Justice O'Connor explained for the Court in *Olano*, "[w]aiver is different from forfeiture," the latter concept being defined as "the failure to make the timely assertion of a right." 507 U.S. at 733. That is precisely respondent's point with regard to ratification—petitioner's claims are barred because she failed to assert them in timely fashion. The ratification rule is reducible to the following two propositions: (1) when a party learns of grounds to rescind a prior agreement or transaction, "he must act promptly, '[a]nnounce his

purpose and adhere to it'," or lose the right to do so, *Shappirio* v. *Goldberg*, 192 U.S. 232, 242 (1904); and (2) an essential component of the prompt action and announcement of purpose required is "return-[ing] to the other party what he has received, so as to put [the defendant] in the same position he was in before." *Gay* v. *Alter*, 102 U.S. (12 Otto) 79, 80 (1880). Petitioner, by failing to make the required tender within a reasonable time after she discovered grounds for avoiding the release agreement, has forfeited—*not* waived—her right to press ahead with her claims in court. See *Olano*, 507 U.S. at 733.

The theory of ratification is not that the party with the power of avoidance is precluded by the original contract or transaction. It is, instead, that the party's retention of the consideration must be construed as an implied "promise to perform" the original contract, and it is that implied promise—*not* the antecedent, originally voidable promise—that the doctrine of ratification enforces. Restatement § 85. As the Fifth Circuit has explained, "[r]atification operates to allow a party having the power to avoid his contractual duty to make, or be deemed to have made, a new promise to perform his previously voidable duty [on the promisor's part]."[11] *Wamsley*, 11 F.3d at 538; see also *Blistein* v. *St. John's College*, 74 F.3d 1459, 1466 (4th Cir. 1996).

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[11] In arguing that "any new promise made through ratification is also subject to OWBPA" (U.S. Br. 18), the Solicitor General again overlooks the meaning of "waiver," as did the Third Circuit in ruling that ratification can be sustained only by "say[ing] that Congress only intended that the OWBPA requirements apply to the 'first' waiver." *Long*, 105 F.3d at 1539-40. A promise implied in law to honor a prior waiver of ADEA rights is, by definition, not itself a waiver. *See Wamsley*, 11 F.3d at 540 n.11. This Court drew a similar distinction in explaining why the unenforceability of an unlawful contract does not defeat the requirement that the consideration be restored: "[T]he action [for restitution] is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain." *Central Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U.S. 24, 60 (1891).

Petitioner and her *amici* argue that a release that does not meet the requirements of the OWBPA is "void" and therefore incapable of being ratified. That is not so. The OWBPA simply "d[oes] not characterize the legal effect of a release which fails to satisfy the statutory requirements." *Long*, 105 F.3d at 1535. Given that established common law rules are retained unless expressly superseded by statute, see *United States* v. *Texas*, 507 U.S. at 534, the silence of the OWBPA on the legal effect of a non-complying waiver compels the conclusion that such a release is merely "voidable" rather than "void." At common law, the fact that a contract was not knowing or voluntary "did not void a contract, but, rather, only rendered that contract voidable." *Blistein*, 74 F.3d at 1466 (citing Restatement § 7, cmt. b).

Even on its own terms, the Solicitor General's argument that noncomplying waivers are void utterly fails to persuade. As he correctly notes, "[t]he propriety of calling a transaction a voidable contract rests primarily on the traditional view that the transaction is valid and has its usual legal consequences until the power of avoidance is exercised." U.S. Br. 15 (quoting Restatement § 7, cmt. e). There can be no doubt that the underlying transaction here at issue—a waiver of legal rights—has traditionally been viewed as valid. As long ago as the 19th Century, it was settled that "[a] party may waive any provision, either of a contract or of a statute, intended for his benefit." *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159 (1872). The presumptive waivability of legal rights persists to this day. See *United States* v. *Mezzanatto*, 513 U.S. 196, 200-01 (1995) ("Rather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption."); see also *id.* at 213 (Souter, J., dissenting) (agreeing that the law incorporates a "fallback rule of permissible waiver").

Indeed, the very purpose of the OWBPA was to *adopt* (with certain modifications) the EEOC's proposal (29 C.F.R. § 1627.16(c) (1987)) to provide expressly that employees are free to settle age discrimination claims with their employers without Commission supervision. It is true that Congress suspended the proposed regulation for three years, but the fact is that Congress, after conducting hearings and adding a number of additional procedural protections to those proposed by the EEOC, cleared the way for unsupervised settlements, as the Commission had proposed, by enacting the OWBPA. As a consequence, it cannot be denied that "federal law *expressly approves* the use of early retirement incentives [and other forms of consideration] conditioned upon the release of [ADEA] claims." *Lockheed Corp.* v. *Spink*, 116 S. Ct. 1783, 1791 n.6 (1996) (emphasis added) (citing OWBPA); see also *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) ("[S]ettlements of ADEA claims . . . are clearly allowed.").

To be sure, waivers, though traditionally, are not invariably, permitted, see *Mezzanatto*, 513 U.S. at 201, and the OWBPA clearly provides that an individual "may not waive" rights under the ADEA unless the waiver is knowing and voluntary. 29 U.S.C. § 626(f)(1). This language does not dictate a conclusion that noncomplying waivers are completely void. Rather, it is entirely consistent with the "may not waive" language—and fully consistent with the intent of Congress—to hold that noncomplying waivers are voidable by, and unenforceable against, the employee. As the formal requirements set forth in 29 U.S.C. § 626(f)(1)(A)-(H), as well as § 626(f)(1)'s ban on unknowing and involuntary waivers, suggest, the concern of Congress was that employees be protected against waiving their rights due to pressure from their employers or ignorance of their rights and the relevant facts. See *Blistein*, 74 F.3d at 1466. Employees receive the full measure of that protection if a noncomplying waiver is viewed as voidable rather than void because it is hornbook law that, unless ratified based on full

knowledge of the facts giving rise to a power of avoidance, a voidable contract *cannot* be enforced against the party with the power of avoidance.[12] See generally 1 Joseph M. Perillo, *Corbin on Contracts* § 1.6, at 18 (Rev. ed. 1993).

Indeed, the Solicitor General's interpretation of the statute as rendering a noncomplying waiver absolutely void, as opposed to merely voidable by the employee, produces absurd results that Congress surely did not intend. Under that view, no matter how favorable a release is to the employee—and no matter how much the employee is satisfied with a settlement—the OWBPA "simply does not permit an employee to elect" to hold the employer to the benefit of his bargain, if the agreement embodying it fails to satisfy the procedural requirements of § 626. U.S. Br. at 17. Accordingly, any attempt by the employee to enforce the settlement agreement against an employer who reneges on the agreement would be doomed to failure because the agreement is not merely voidable but void. In this sense a victory for the employee in this case would almost certainly turn out to be a Pyhrric one for employees as a whole.

Denying an employee the power to "hold a recalcitrant employer to its bargain" would be an absurd result given "the policy of the OWBPA to protect older workers," *Long*, 105 F.3d at 1546 (Greenberg, J., dissenting). The absurdity that inheres in the Solicitor General's construction of the statute is reason enough to reject it and adopt the view that noncomplying waivers are merely voidable by, and unenforceable against, the employee. *See Public Citizen* v. *Department of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in judgment); *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 510-11 (1989).

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[12] Because ratification cannot occur, as a matter of law, until the party with the power of avoidance has full knowledge of grounds for avoiding the contract, petitioner is quite wrong in her unsupported assertion that ratification occurs when "the individual cashes the check" received from the employer in consideration of a release. Pet. Br. 28.

In view of the foregoing, the OWBPA does not "speak directly" to the established common law doctrine of ratification. As the Fourth Circuit correctly held, the OWBPA therefore does not "abrogate[] the common law principle that an invalid agreement can be ratified by subsequent conduct." *Blistein*, 74 F.3d at 1465-66; see also *Wamsley*, 11 F.3d at 539. Accordingly, the ratification rule adopted by the Fourth and Fifth Circuits should be affirmed.

b. Furthermore, neither petitioner nor her *amici* attempt to show that the statutory text precludes a tender-back requirement premised upon the common law doctrines of equitable estoppel. This line of argument is available in defense of the judgment below on either of two rationales. First, estoppel is merely an alternative legal theory in support of the tender-back rule this Court granted certiorari to review. As this Court ruled in *Yee* v. *City of Escondido*, 503 U.S. 519 (1992), parties in this Court "are not limited to the precise arguments they made below," and "can make any argument in support of [a] claim." *Id.* at 534. Second, to the extent estoppel may be viewed as an independent claim not decided below, it is nonetheless properly presented here, for even where "alternative grounds were not reached below," "[a] respondent is entitled . . . to defend the judgment on any ground supported by the record." *Bennett* v. *Spear*, 117 S. Ct. 1154, 1163 (1997); see also, *e.g.*, *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

Whatever else may be said, it is surely not the case that the text of the OWBPA forecloses application of equitable estoppel. Even more clearly than ratification, a finding that an employee is estopped would not be tantamount to enforcing a waiver that does not satisfy the requirements of the OWBPA. The basis for the hoary doctrine of equitable estoppel is the inequity of permitting a party to challenge the validity of a contract while retaining the benefits received under the contract. See, *e.g.*, *McLean* v. *Clapp*, 141 U.S. 429, 432 (1891) ("[T]he law is clear that [one] cannot take the benefits of [a] contract and repudiate its burdens."); see also, *e.g.*, *United States ex rel. Int'l Contracting Co.* v. *Lamont*, 155 U.S. 303 (1894). The doctrine does not bind the party estopped to the invalid contract in any manner, but rather "stoppeth" his mouth from denying the validity of the contract for as long as he has failed to tender back the consideration paid him on the faith of the contract.

Unlike ratification—which is irreversible once it occurs because ratification "extinguish[es] the power of avoidance" under a voidable contract, Restatement § 7—the duration of estoppel is entirely within the control of the party subject to the estoppel. As this Court held in *Buffum* v. *Peter Barceloux Co.*, 289 U.S. 227, 234 (1933), "[t]he basis for an estoppel is cut away" once the plaintiff has returned the benefits of the transaction. The fact that estoppel is reversible shows plainly that the effect of estoppel is not to produce a "waiver," *i.e.*, a "relinquishment" or "abandonment," of the right to sue under the ADEA—terms that carry a connotation of permanency. *United States* v. *Olano*, 507 U.S. at 733. Instead, estopping a plaintiff from challenging a waiver of ADEA rights merely *suspends* his ability to bring suit pending restoration of the consideration to the defendant, a result that is compelled by "justice and equity." *Wamsley*, 11 F.3d at 542. Upon making such a restoration, the plaintiff is entirely free to proceed under the ADEA against the employer. Accordingly, the estoppel doctrine provides an independent basis for sustaining the tender-back rule applied by the Fifth Circuit below.

2. *Legislative History*. To bolster their unavailing textual arguments, petitioner and her *amici* turn to a number of arguments based on the legislative history. These arguments are offered to show that with the enactment of the OWBPA, Congress intended to wipe away *all* of the common law of contracts with respect to waivers of rights under the ADEA. Again, their arguments are unpersuasive.

Petitioner finds it "significant" that "in the body of legislative history accumulated in the two years in which Congress contemplated the [OWBPA] no reference or commentary is made championing ratification of a waiver as a bar to suit." Pet. Br. 27 n.15. Petitioner has it half-right. Not only is the legislative history barren of any statement championing ratification; there is *no statement at all* relating to ratification or equitable estoppel. Presumably, the legislative record would bear some evidence of intent to repeal the common law on these subjects if that was in fact the legislative intention.[13] See, *e.g.*, *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 380 (1988) (noting that a "major change" in law "would not likely have been made without specific provision in the text of the statute" and that it is "most improbable" that such a change "would have been made without even any mention in the legislative history"); but see *Long*, 105 F.3d at 1539 n.17 (dismissing as "wrong" the notion that intent to depart from the common law would necessarily be manifested "in the text or legislative history"). Accordingly, if any conclusion is to be drawn from this silence, it is that in enacting the OWBPA, Congress simply did not address—and did not intend to abolish—the tender-back rule.

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[13] In fact, the legislative history does show that Congress plainly —and deliberately—changed the common law concerning the standards for determining whether a waiver is knowing and voluntary. Prior to the OWBPA, the federal courts were split on that issue under the ADEA. *Compare, e.g., Cirillo* v. *Arco Chem. Co.*, 862 F.2d 448 (3d Cir. 1988) (applying totality of circumstances test as matter of federal common law) *with Lancaster* v. *Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir. 1987) (looking to state law requirements for knowing and voluntary waiver). Both the statute (*see* 29 U.S.C. § 626(f)(1)(A)-(H)) and the legislative history plainly evince Congress' adoption of the former approach and rejection of the latter approach based on state law: "The [Senate Labor and Human Resources] Committee expreses [sic] support for the approach taken *on this limited issue* in *Cirillo* . . . and disapproves the approach adotped in *Lancaster*". *Senate Report* at 32, 1990 U.S.C.C.A.N. at 1537 (emphasis added). By contrast, *neither* the text *nor* the legislative record evidences the radical departure petitioner urges on the Court.

This conclusion carries added force because when the OWBPA was enacted in October 1990, *every* reported federal decision on the issue had ruled that an unknowing and involuntary waiver of ADEA rights could be ratified by the employee's subsequent knowing retention of benefits. See *Constant* v. *Continental Tel. Co.*, 745 F. Supp. 1374 (C.D. Ill. 1990); *O'Shea* v. *Commercial Credit Corp.*, 734 F. Supp. 218 (D. Md. 1990), *aff'd*, 930 F.2d 358 (4th Cir. 1991); *Widener* v. *Arco Oil & Gas Co.*, 717 F. Supp. 1211 (N.D. Tex. 1989). Had Congress intended to usher in the opposite result with the enactment of the OWBPA, it would have explicitly done so in the face of this unbroken authority upholding ratification under the ADEA, of which Congress was presumptively aware. See *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978).

The Solicitor General notes (U.S. Br. 24), as does petitioner (Pet. Br. 31 n.18), that the Minority Views of dissenting House and Senate Republicans quoted a letter from IBM that purportedly mentioned the possibility that an employee might be permitted to retain the consideration paid for a release while suing in violation of the release. See *Senate Report* at 64, 1990 U.S.C.C.A.N. at 1569 (Minority Views); H.R. Rep. No. 101-664 at 87 (1990) (Minority Views) ("*House Report*"). From this fleeting reference, as well as the failure in the House Committee of an amendment that would have given an employer the right to a credit against the judgment in the event the employee were to recover, the Solicitor General concludes that "it was understood that the OWBPA would permit an employee who signed an invalid waiver to pursue his or her ADEA claim while retaining the separation benefits paid under the waiver." U.S. Br. 24.

This is, indeed, a weak reed for the result the Solicitor General proposes. First, as the Third Circuit forthrightly acknowledged in *Long*, the proposed offset provision "did not mention ratification or tender back." 105 F.3d at 1540 n.19. It therefore bears no weight on either issue. Second, the argument fails to take account of the fact

that the offset provision was merely one provision among many in a larger bill offered by opponents of the OWBPA at a markup session as a complete substitute for the OWBPA, and no reason was given for the party-line rejection of the substitute bill or its individual provisions. See *House Report* at 87 (Minority Views). This is significant because "[r]ejection of an entire bill cannot be taken to be a specific rejection of each and every feature [of the failed bill]." *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 265 (1945) (Rutledge, J.). Finally, this Court "ha[s] often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach [and effect]." *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964); see also, *e.g.*, *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 483 (1981).

Additionally the Solicitor General badly misconstrues the IBM letter—which, incidentally, was submitted in connection with a predecessor to the OWBPA, not the OWBPA itself. The letter did not address the tender-back rule at all. Instead, it simply stated that "[t]here is no reason an employer should be expected to make these significant payouts [as part of severance packages] and then have to bear the high costs of litigating ADEA claims with the recipients." *House Report* at 87; *Senate Report* at 64, 1990 U.S.C.C.A.N. at 1569. That defense of the concept of unsupervised waivers is a far cry from a plea for a tender-back requirement. For these reasons, the nuggets the Solicitor General has mined from the legislative record are, to say the least, far from shimmering.

Petitioner, not to be outdone, summons forth throughout her brief (*e.g.*, Pet. Br. 20-21 nn.6-7, 36-37) a barrage of statements from individual Members of Congress expressing their view that employers have the power to coerce older workers into signing waivers of ADEA rights. The problems with this line of argument are multiple. First, it ignores this Court's admonition that "[i]f legislative history is to be considered, it is preferable to consult the documents prepared by Congress when deliberating," *i.e.*, the Committee Reports of both Houses. *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 580 (1995). Those documents, given enactment of the legislation, at least arguably can be viewed as evidence of the intent of Congress, but fleeting comments uttered in hearings or colloquies or statements on the House or Senate floor can hardly be viewed as a reflection of the intent of the legislative body as a whole. See *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969) (Harlan, J.). For this reason, "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler* v. *Brown*, 441 U.S. 281, 311 (1979).

Second, some of these statements relate not to the OWBPA, but rather to predecessor bills that were fundamentally different from the OWBPA. For instance, Senator Metzenbaum's statement at a March 16, 1989 hearing that " '[i]n th[e] non-dispute context, where employees have no reason to be on guard to protect their rights, it is simply bad public policy to allow waivers' " (Pet. Br. 20 n.6) pertained to the Employee Waiver Protection Act of 1989 ("EWPA"), S. 54, which would have forbidden all unsupervised ADEA waivers except those reached in settlement of pending age discrimination charges. See *Senate Report* at 31, 1990 U.S.C.C.A.N. at 1537. Although the EWPA was reported out of Committee in 1989, it died in Congress. The OWBPA differs radically from the earlier bill, however, because it *allows* unsupervised waivers even in the context where Senator Metzenbaum condemned waiver as "bad public policy" —where the employee has not filed a discrimination charge.[14] By allowing unsupervised waivers, Congress

[14] Congress apparently heeded the EEOC's concerns about the House equivalent to the EWPA, the Age Discrimination and Employment Waiver Protection Act of 1989 ("ADEWPA"), H.R. 1432, 101st Cong. (1989). The then-Chairman of EEOC testified that the Commission was "concerned" that the ADEWPA, by barring unsupervised waivers in the non-dispute context, "may prevent older

explicitly rejected the premise of the Fair Labor Standards Act, 29 U.S.C. § 216, whose remedial provisions are adopted by reference in the ADEA, see 29 U.S.C. § 621(b), that unsupervised release agreements between employers and employees are inherently coercive and unfair to the employee. See *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697 (1945) (unsupervised waivers barred under FLSA). Obviously, legislative statements pertaining to a different piece of legislation that is at odds with the OWBPA in critical respects have no relevance in determining the intent of Congress in enacting the OWBPA.

In the end, the efforts of petitioner and her *amici* to glean from the legislative history a legitimate basis for rejecting principles of the common law that date back to the time of Lord Coke—even if not an enterprise necessarily doomed to failure, see *United States* v. *Texas*, 507 U.S. at 534—fails to produce the clear legislative intent needed to overcome established features of the common law. As the Fourth Circuit correctly put it: Rejecting the tender-back rule would "allow [employees] to have it 'both ways,' to retain the benefits that they receive pursuant to their retirement [or severance] agreements, yet to challenge, through suits against their unsuspecting employers, the very agreements under which those benefits were extended. This, we find no evidence Congress contemplated." *Blistein* v. *St. John's College*, 74 F.3d at 1466.

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workers from exercising their rights rather than protecting them." *Joint Hearing Before the Select Committee on Aging and the Subcommittee on Employment Opportunities of the Committee on Education and Labor*, 101st Cong. 16 (Apr. 18, 1989). In addition, he added that "[r]equiring written claims of age discrimination could inhibit employers and employees from informally resolving age claims." The OWBPA, as enacted the following year, endorsed the then-Chairman's recommendation that a "better approach" would be to "protect employees against coercion to waive their rights, while preserving their choice to waive without filing a claim with EEOC or in court," and guaranteeing the EEOC enforcement power to prosecute notwithstanding an employee waiver. *Id.* at 16-17.

B. The Purpose Of The ADEA And OWBPA Do Not Forbid Application Of The Tender-Back Rule.

Petitioner and her *amici* present two lines of reasoning in support of their view that the tender-back rule is contrary to the purposes of the ADEA. The first is based on an analogy between the ADEA and the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, the statute under which this Court's two-page, *per curiam* decision in *Hogue* v. *Southern Railway Co.*, 390 U.S. 516 (1968), rejected the tender-back rule for injured railroad workers. The second is based on an examination of the operation of the rule in light of the ADEA's policy of deterring age discrimination and the OWBPA's policy of denying enforcement to noncomplying waivers.

1. In *Hogue*, a railroad employee who had suffered a knee injury on the job agreed to accept $105 in exchange for a release. The parties entered into the settlement in the mistaken belief that the worker's knee was merely bruised and not permanently injured. 390 U.S. at 517. When it later turned out that the injury was permanent and serious, the employee, without making a pretrial tender of the $105 to the employer, filed suit seeking damages, arguing that the release was the product of a mutual mistake of fact. On appeal to this Court from a state court ruling that a pretrial tender was required, the railroad confessed error and refused to defend the judgment.[15] *Id.* at 516.

Although Justice Harlan simply voted to vacate summarily based on the confession of error, *id.* at 517, the remainder of the Court proceeded to address the merits of the appeal (with only briefing from petitioner). The Court held that "a rule which required a refund as a

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[15] The railroad "filed before argument a 'Memorandum Confessing Error' which state[d] that 'its insistence before the Georgia courts that the applicable law required a tender, and the decision of the Georgia Court of Appeals requiring a tender, were erroneous. Accordingly, respondent does not desire to offer brief or argument against petitioner on this issue, and confesses error.'" 390 U.S. at 516.

prerequisite to institution of a suit would be 'wholly incongruous with the general policy of the [FELA] to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers.'" *Id.* at 518 (quoting *Dice* v. *Akron, C. & Y.R. Co.*, 342 U.S. 359, 362 (1952)). The Court added, however, that "the sum paid [as consideration for the release] shall be deducted from any award determined to be due to the injured employee." *Id.*

Petitioner argues, and the Solicitor General agrees (U.S. Br. 26), that there "is no principle[d] distinction between FELA and the OWBPA" because both statutes are "remedial" statutes enacted for the benefit of employees. Pet. Br. 35. The attempted analogy between the two statutes is unavailing. Putting aside the rather unusual circumstances in which *Hogue* was decided—which may account for the fact that this Court has *never* cited the case in the intervening three decades—the reality is that, except at the most superficial level, "these two 'remedial' statutes [are] fundamentally different in congressional purpose and intent."[16] *Wamsley*, 11 F.3d at 541 n.13.

Motivated by "humanitarian purposes," *Metro-North Commuter R.R.* v. *Buckley*, 117 S. Ct. 2113, 2117 (1997), FELA was intended not just to provide a remedy for

[16] The bulk of the decisions applying *Hogue* in other statutory contexts never proceed beyond superficial analysis, concluding that *Hogue* is applicable to *any* statute that can be characterized as "remedial," an overbroad view that petitioner and her *amici* wisely do not defend in this Court. *See, e.g., Botefur* v. *City of Eagle Point*, 7 F.3d 152, 156 (9th Cir. 1993) (applying *Hogue* to § 1983 context on ground that the decision "is generalizable to suits under other federal compensatory statutes"). The rare exception is *Smith* v. *Pinell*, 597 F.2d 994 (5th Cir. 1979) (per curiam), a case under the Jones Act, 46 U.S.C. § 688; although the Solicitor General states that the Jones Act is "not as analogous to FELA as is the ADEA" (U.S. Br. 30), that statement is demonstrably incorrect. *See Kernan* v. *American Dredging Co.*, 355 U.S. 426, 439 (1958) (terming plaintiffs under FELA and Jones Act "*perfectly* analogous" because latter statute adopted for seamen the protections provided to railroad employees under FELA) (emphasis added).

injured workers, but "to provide *liberal recovery*." *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 432 (1958) (emphasis added); see also, *e.g., Metro-North*, 117 S. Ct. at 2124 (Ginsburg, J., concurring in judgment in part and dissenting in part). The liberal recovery in favor of railroad workers is accomplished by simultaneously "strip-p[ing] [an employer] of his common-law defenses" and requiring the railroad to account for any injuries caused "even [in] the slightest" by any negligence on the part of the railroad. *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506-07 (1957); see 45 U.S.C. §§ 51, 53. Congress so completely took the injured railroad worker under its protection that it took the rare step of commissioning the federal courts "to develop a federal common law of negligence" under the statute. *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 558 (1994) (Souter, J., concurring). These unusual features of FELA produce the congressionally desired result of "'unburdened and expeditious recoveries' by rail workers," *Wamsley*, 11 F.3d at 541 (quoting *Smith* v. *Pinell*, 597 F.2d 994, 996 (5th Cir. 1979)). It therefore is clear that "[t]he right of recovery under the FELA . . . is unique." *Id.* at 540.

The ADEA, however, is fundamentally different. Rather than essentially federalizing a whole area of law for the protection of employees, the ADEA takes aim at a narrow target—discrimination in employment on account of age. See 29 U.S.C. § 623. Far from facilitating liberal recovery, the ADEA makes recovery difficult. It erects a fairly stringent standard of liability under which an ADEA claim "cannot succeed unless the employee's protected trait [*i.e.*, age] actually played a role" in the employer's challenged decision. *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993). The stringency of the standard of liability is compounded by the fact that the ADEA "affords the employer a 'bona fide occupational qualification' defense, and exempts certain subject matters and persons" from its reach. *Id.* at 616 (citations omitted). Thus, to say the least, recovery under the ADEA is neither "liberal" nor "unburdened and expeditious."

This critical distinction between the two statutes illustrates why the *Hogue* analysis of the tender-back rule cannot validly be applied to the ADEA. Because the rules under FELA are, by design, structured so as to shift onto each railroad the cost of "the legs, eyes, arms, and lives which it consumed in its operations," *Wilkerson* v. *McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring), the statute "has effectively rendered liability of the employer a given in the great majority of cases." *Wamsley*, 11 F.3d at 542. Given the high likelihood of eventual recovery under FELA, a pretrial tender requirement would essentially be an empty formality. Under the ADEA, however, the employee's likelihood of success on the merits is far more remote (especially given the likely unavailability of the "disparate impact" theory, see *Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring)). As such, a tender would not be a mere formality under the ADEA.

One last distinction is that the provision of FELA addressing releases, 45 U.S.C. § 55, is vastly more protective of railroad employees than anything in the OWBPA. Section 55 explicitly declares "void" "[a]ny contract . . . or device whatsoever" that would permit a railroad "to exempt itself from . . . liability." *Id.* This provision also expressly commands that where a sum has "been paid to the injured employee . . . on account of the injury," then that amount should be "set off" against the judgment "in any action" brought by the employee under FELA. *Id.* Thus, FELA much more clearly occupies the field of releases than does the OWBPA. Although *Hogue* declined to rely solely upon § 55 (390 U.S. at 518), the absence of a similar provision in the OWBPA cautions heavily against expanding the rule in *Hogue* to cover cases under that Act. For the foregoing reasons, *Hogue* does not, in either terms or rationale, control here.

2. As a fall-back position, the Solicitor General argues (U.S. Br. 26) that "[a] tender back requirement would enable an employer to escape sanction for age discrimination when a terminated employee lacks the resources to

tender back his severance benefits prior to filing suit." That is clearly not true. Unlike FELA, which is enforceable only through private lawsuits brought by injured workers (or their estates), the ADEA is not similarly limited in its enforcement. Under the ADEA, even where the affected employee does not sue on his own behalf, an employer guilty of age discrimination can just as effectively be called to account for its violation of the law through the independent enforcement authority of the EEOC, which, oddly enough, the Solicitor General has overlooked.

The EEOC is authorized by statute to investigate, either on its own initiative or upon the filing of a charge, any employer for violations of the ADEA. See 29 U.S.C. § 217. In the event the Commission wishes to proceed against an employer suspected of age discrimination, the EEOC can file suit in federal district court to obtain legal and equitable relief. See *id.* § 626(b). The EEOC can also seek relief—both monetary and equitable—on behalf of any employee who has been discriminated against but has not sued on his own behalf, including a court order compelling an employer to reinstate and grant back pay to an employee wrongfully terminated on account of his age. See *id.* § 216(c). Once the EEOC has opened a proceeding, moreover, "it may continue any investigation and may secure relief for all affected persons notwithstanding a request by a charging party to withdraw a charge." 29 C.F.R. § 1626.13 (1995). In conducting these enforcement activities, the EEOC can freely call upon the assistance of the affected worker, who, by statute, cannot be bound by any waiver not to file a charge or otherwise cooperate with the Commission. See 29 U.S.C. § 626(f)(4) (Supp. 1997) ("No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission."). These enforcement powers are not affected in the least by an employee's waiver of rights: "No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter." *Id.* Accordingly, irrespective of any release by

an employee, the EEOC has "independent authority to investigate age discrimination." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

The role of the EEOC is an important one in this statutory scheme. It ensures that even if financial inability to tender back the consideration paid an employee on a nonconforming waiver (or, for that matter, a valid and enforceable waiver) would preclude him from filing suit, the ADEA can nonetheless be enforced against the offending employer. Although the private right of action is a component of the ADEA enforcement scheme, the integrity of the enforcement scheme is not hindered by an employee's inability to assert his rights under the ADEA in court. *Cf. Gilmer*, 500 U.S. at 28-29 (upholding mandatory arbitration of ADEA claims). That presumably is why the employee's legal right to seek relief under the ADEA is "extinguished" (*id.* at 27) if the EEOC files suit on his behalf. See 29 U.S.C. § 626(c)(1) ("Any person aggrieved may bring a civil action . . .: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the [EEOC] to enforce the right of such employee under this chapter.").

In light of the EEOC's broad authority to enforce the ADEA in place of the employee, the dogmatic, oft-repeated assertions of petitioner and her *amici* that application of the tender-back rule would permit employers to discriminate at will can only be regarded as disingenuous. Equally misleading is the view propounded in *Howlett* v. *Holiday Inns, Inc.*, No. 95-6236, 1997 U.S. App. LEXIS 20504, *11 (6th Cir. Aug. 5, 1997), that adoption of the tender-back rule would take away any "external incentive an employer has to comply with the OWBPA" because it could achieve the benefit of a valid release—repose—without meeting the statutory requirements. The purpose of settlement is to avoid the burdens and expense of litigation. Obviously, any rational employer would prefer the *certainty* of repose (which comes only from full compliance with the OWBPA) over the *possibility* that, through application of the tender-back rule, an employer might escape litigation on a few noncomplying waivers. Therefore, the policies of the ADEA and OWBPA do not militate against adoption of the tender-back rule.

Finally, given the universality of the tender-back requirement, which arises out of various legal doctrines under both state and federal common law, it is clear that many plaintiffs face the choice of foregoing litigation or finding the resources to repay monies received as part of a settlement package. Petitioner and her *amici* make no effort to explain why, among all plaintiffs including victims of race or gender discrimination, age discrimination plaintiffs should be categorically spared this burden. See, *e.g.*, *Fleming* v. *United States Postal Serv.*, 27 F.3d 259 (7th Cir. 1994) (holding that tender-back rule does apply under Title VII).[17] At a minimum, Congress surely would have noted this radical change in the law if it had so intended.

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[17] In addition to Title VII, courts have applied the tender-back rule under such diverse statutes as the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*, *Somervell* v. *Baxter HealthCare Corp.*, 966 F. Supp. 18 (D.D.C. 1997); the Employment Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, *Deren* v. *Digital Equip. Corp.*, 61 F.3d 1 (1st Cir. 1995); the Equal Pay Act, 29 U.S.C. § 206(b), *Wagner* v. *Nutrasweet Co.*, 95 F.3d 527 (7th Cir. 1996); and the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.*, *Williams* v. *Phillips Petroleum Co.*, 23 F.3d 930 (5th Cir. 1994). In *Fleming*, Chief Judge Posner described the tender-back rule as "one of the most elementary principles of contract law," 27 F.3d at 260, adding that it was of such vintage that it "would surely be a component of any federal common law of releases." *Id.* at 261. Although he added that the rule "*may* have to give way" when a statute expressly regulates releases, as do FELA and the ADEA, *id.* (emphasis added), that equivocal statement, which refused to take a position on the application of the rule under the ADEA, was strictly in the nature of *obiter dictum* in *Fleming* (a Title VII case).

C. Rejection Of The Tender-Back Rule Would Significantly Reduce Employers' Incentive To Reach Out-Of-Court Settlements, Which Would Frustrate The ADEA's Explicit Preference For Voluntary Settlement Of Charges Of Age Discrimination.

Petitioner and her *amici* urge the Court to give effect to the "purposes" of the ADEA when it suits them, but then ignore an important legislative objective written explicitly into the statute—the preference for voluntary resolution of age discrimination claims through settlement and conciliation. Although the Solicitor General inexplicably seems to deny it (U.S. Br. 27 n.14), the text of the ADEA makes clear that Congress placed a premium on resolving age discrimination claims out of court whenever possible. Section 626(b) requires the EEOC, "[b]efore instituting any action [to enforce the ADEA] under this section," to "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(b). Similarly, under § 626(d), an individual with a potential age discrimination claim cannot file suit without first exhausting his administrative remedies before the EEOC, thereby giving the Commission the opportunity to pursue steps short of litigation to resolve the dispute. *Id.* § 626(d). These provisions eliminate any doubt that the ADEA, like Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, "express[es] a strong preference for encouraging voluntary settlement of employment discrimination claims." *Carlson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981).

The rule that petitioner and her *amici* advocate—that an employer who has executed a defective waiver is entitled to retain the proceeds paid in consideration of the waiver indefinitely—can only frustrate the congressional policy of encouraging settlements. As this Court noted in *McDermott* v. *AmClyde*, 511 U.S. 202, 211-12 (1994), a defendant will not settle (or will

not pay as much for a settlement) if it remains open to later suit, for the simple reason that settlement will not spare it the expense and burdens of litigation. The problem is more significant here than in *McDermott*, where the collateral suits were contribution actions brought by co-defendants. Here, the collateral litigation would come from the employee—the *same* person from whom the employer attempted to "buy its peace." As the Fifth Circuit astutely noted in *Wamsley*, this raises the prospect that the employer who pays benefits to an employee in exchange for a release of an ADEA claim will essentially be funding litigation against itself. See 11 F.3d at 539 n.9. It should be obvious that many employers will not be willing to pay benefits to an employee if the employee can turn around and use those benefits as a litigation "war chest" to pay attorneys fees or costs in later court proceedings.[18]

The *Long* court, while conceding that this point is "not without merit," nonetheless rejects it with the statement that "[e]mployees with baseless claims have strong financial incentives to keep severance payments rather than risk them in prolonged litigation." *Long*, 105 F.3d at 1543. This simply fails to take account of the realities of litigation, which is often resorted to, in petitioner's words (Pet. Br. 18), to achieve "leverage" to extract payments from "deep pocket" defendants. As the court explained in *Kristoferson* v. *Otis Spunkmeyer, Inc.*, 965 F. Supp. 545 (S.D.N.Y. 1997):

> [N]o federal district court can ignore the wave of dubious and potentially extortionate discrimination

[18] Indeed, some employers may respond to such a perverse incentive structure by exercising their prerogative to terminate employees without giving them *any* benefits, a state of affairs that would hardly be beneficial for employees as a class. Retention of consideration is not required to ensure the availability of counsel because "[f]ederal fee-shifting statutes and the promise of a contingency fee should . . . provide sufficient incentive for counsel to take meritorious cases." *Lewis* v. *Casey*, 116 S. Ct. 2174, 2191 n.4 (1996) (Thomas, J., concurring).

> cases currently flooding the federal docket. Undoubtedly part of the reason for this flood, which threatens to drown even valid anti-discrimination lawsuits in its wake, is the fact that current law enables such lawsuits to be brought at little or no economic risk to the plaintiffs, since such suits are typically brought on a contingent fee basis, with attorneys fees recoverable by prevailing plaintiffs but not by prevailing defendants. To enable a plaintiff who has already received substantiai consideration for a release to keep that consideration while at the same time bringing the very lawsuit the release was intended to obviate is not only unfair on its face but is bound to encourage such doubtful litigation.

Id. at 548 (internal citation omitted).

Petitioner (Pet. Br. 29) and the Solicitor General (U.S. Br. 27 n.14) cavalierly respond to the risk of deterring settlements by asserting that employers can ensure the effectiveness of their employees' waivers through "[c]ompliance with the OWBPA's requirements." *Id.* Implicit in the assertion is the premise that it "should not be difficult for an employer to meet" those requirements. *Howlett* v. *Holiday Inns, Inc.*, No. 95-6236, 1997 U.S. App. LEXIS 20504, at *12-13 (6th Cir. Aug. 5, 1997). If only that were so. In the six years since the OWBPA was enacted, the EEOC, for reasons known only to itself, has not devised a form release to guide employers in drafting releases that comply with the statute. As a result, the only guideposts employers have in performing that difficult task is the at times open-ended text of the statute, and even that point of reference is confounded by vague interpretive guidelines issued by the EEOC. See, *e.g.*, Waiver of Rights and Claims Under the Age Discrimination in Employment Act, 62 Fed. Reg. 10,787, 10,790 (Mar. 10, 1997) (proposed EEOC guideline stating that waiver agreements should avoid "long, complex sentences" and must "take into account such factors as the level of comprehension and education of typical participants") (to be codified at 29 C.F.R. § 1625.22).

Even accepting the Sixth Circuit's welcome suggestion that the statutory requirements should be read "in a common-sense manner and not dogmatically," *Howlett*, 1997 U.S. App. LEXIS 20504, at *13, the vagueness of the statute nevertheless leaves employers no room for assurance that any waiver will be viewed by a court, after the fact, as in full compliance with the OWBPA. For example, waivers must be embodied in an agreement that is "written in a manner calculated to be understood by such individual, or by the average individual eligible to participate." 29 U.S.C. § 626(f)(1)(A). Although this requirement is clear enough in some of its applications—for example, waivers intended for English-speaking employees must be written in English—in other contexts, as even the *Howlett* court was constrained to concede, "questions may arise" as to whether an agreement meets the requirement. *Howlett*, 1997 U.S. App. LEXIS 20504, at *13. On the resolution of those thorny, case-specific questions will turn the enforceability of the waiver.[19]

Moreover, the Solicitor General ignores another element of the statute that considerably undermines the ability of any employer to predict whether a waiver will meet the requirements of the OWBPA—the transcendent "knowing and voluntary" requirement. The statute provides that the specific requirements of § 626(f)(1)(A)-(H) are only "minimum" criteria, 29 U.S.C. § 626(f)(1), meaning that a release that fully satisfies all of those requirements nevertheless can be invalidated as not knowing and voluntary. Although one would naturally refer to the large body of state contract law for guidance in determining when an

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[19] Moreover, the Sixth's Circuit's inquiry into maintaining "proper" incentives for compliance with the OWBPA is quintessentially legislative in nature. *See O'Melveney & Myers* v. *FDIC*, 512 U.S. 79, 89 (1994). "Within the federal system, at least, we have decided that that function of weighing and appraising [competing policy interests] 'is more appropriately for those who write the laws, rather than for those who interpret them.'" *Id.* (quoting *Northwest Airlines* v. *Transport Workers Union*, 451 U.S. 77, 98 (1981)).

agreement is knowing and voluntary, the OWBPA (at least if the legislative history is to be given effect) takes away that logical point of reference. See *Senate Report* at 32, 1990 U.S.C.C.A.N. at 1537 (quoted in *supra* note 13). Thus, it will be exceedingly difficult for an employer to be certain that its releases have fulfilled the requirements of the statute until a court declares that to be the case—which, by definition, can only occur *after* the employer is subjected to the litigation which it sought to avoid.

Of course, respondent does not dispute that a noncomplying waiver of ADEA rights is unenforceable. That result is compelled by the OWBPA, and Congress' judgment must be honored. It nevertheless is an entirely separate question whether employees should be required to return, in advance of suit, the consideration they received if they wish to take advantage of a defect in a waiver. Because rejection of the tender-back rule's affirmative answer to that question would frustrate the legislative goal of promoting out-of-court resolution of charges of age discrimination, the common law rule should be adopted as controlling.

* * * *

For the foregoing reasons, "this is not one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted." *O'Melveney & Myers* v. *FDIC*, 512 U.S. at 89. The established common law rule precluding parties from simultaneously rejecting the burdens and accepting the benefits of a transaction has not been superseded by the OWBPA and may not be set aside in the name of federal common law.

III. IN THE EVENT THE COURT DEEMS IT APPROPRIATE TO CREATE A SPECIAL RULE OF FEDERAL COMMON LAW THAT A PRETRIAL TENDER OF CONSIDERATION IS NOT REQUIRED, THE COURT SHOULD RECOGNIZE AN "EMPLOYEE FRAUD" EXCEPTION TO THE RULE.

Even if the Court were to accept petitioner's invitation to extend the rule of *Hogue* v. *Southern Railway* to the ADEA context, it does not follow that the tender-back

rule should be rejected out of hand. After all, *Hogue* itself involved a situation where the employee had acted, at all events, in good faith in his dealings with his employer. The Court therefore had no occasion to consider whether it would be inconsistent with federal policy to require a pretrial tender of consideration from an employee who had acquired the benefits of a settlement through bad faith or fraudulent means, and so the question must be regarded as an open one.

To pose the question, respondent submits, is to answer it: There is no federal policy in facilitating fraud. The purpose of Congress in enacting the OWBPA was to protect employees against the risk that they would lose their rights under the ADEA in transactions that are not "knowing and voluntary." 29 U.S.C. § 626(f)(1). Congress, in pursuit of that worthwhile objective, did not thereby grant employees a license to defraud their employers by entering into releases without any intention of honoring them, for the purpose of receiving severance benefits. In other words, Congress gave employees a shield with which to protect their rights; petitioner seeks to convert that instrument into a sword in a campaign to defraud respondent.

Petitioner admitted in her deposition in this case that she decided to sue respondent "[r]ight after" she consulted with her two lawyers. App. A-55. That consultation occurred one week *before* she signed the release and weeks *before* she began receiving the severance payments from respondent. *Id.* Even though she admittedly never intended to honor the release, and planned all along to sue respondent, petitioner misled respondent into believing otherwise through her expression of a willingness to accept a settlement, her execution of the settlement, and her subsequent acceptance of approximately four months of biweekly payments from petitioner. She then proceeded, in the span of a few months, to spend the entire $6,000 bounty her dishonest conduct netted her, and brought suit only when that money had been spent.

This type of conduct should not be countenanced by this Court. As this Court held long ago, "neither a

plaintiff nor a defendant is at liberty to deceive, either actively or passively, his adversary, and a court whose province it is to administer justice will take care that on the trial of every cause neither party shall reap any advantage from his own fraud." *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159 (1872). The tender-back rule, if rejected as a rule for the ordinary case, should nonetheless be retained as the rule for the rare case, such as this one, in which employees entered into their release agreements with no intention of honoring them.[20] Once petitioner has returned the consideration she received through deception, respondent will stand ready to answer —and *refute*—baseless age discrimination claims.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

MICHAEL G. THOMPSON
O.H. STOREY, III
RENEE W. MASINTER
ROSEMARIE FALCONE
ENTERGY SERVICES, INC.
639 Loyola Avenue
New Orleans, LA 70113
(504) 576-2266

CARTER G. PHILLIPS *
STEPHEN F. SMITH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, DC 20006
(202) 736-8000

Attorneys for Respondent

* Counsel of Record

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[20] In defense of the courts that rejected a tender-back rule, they did not encounter the extreme circumstances presented here, and thus were "not swayed" by what appeared to be a remote possibility of the type of brazen employee fraud that has occurred here. *Long*, 105 F.3d at 1543 n.25. The facts of this case show that employee manipulation and deception is more than just a hypothetical concern.

APPENDIX

APPENDIX

Older Workers Benefits Protection Act, 29 U.S.C. § 626(f):

* * *

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement

shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.